

No. SC83941

**IN THE
SUPREME COURT OF MISSOURI**

**STATE OF MISSOURI, ex rel.
JEREMIAH W. (JAY) NIXON, Attorney General**

Relator,

vs.

**THE HONORABLE RALPH JAYNES, Circuit Judge, Randolph County, and
NORMA PRANGE, Circuit Clerk, Randolph County**

Respondents.

Petition for Writ of Certiorari to the Circuit Court of Randolph County, Missouri

RELATOR'S STATEMENT, BRIEF AND ARGUMENT

JEREMIAH W. (JAY) NIXON
Attorney General

CASSANDRA K. DOLGIN
Assistant Attorney General
Missouri Bar No. 38821

Post Office Box 899
Jefferson City, Missouri 65102
(573) 751-3321

Attorneys for Relator
No. SC83941

**IN THE
SUPREME COURT OF MISSOURI**

**STATE OF MISSOURI, ex rel.
JEREMIAH W. (JAY) NIXON, Attorney General**

Relator,

vs.

**THE HONORABLE RALPH JAYNES, Circuit Judge, Randolph County, and
NORMA PRANGE, Circuit Clerk, Randolph County**

Respondents.

Petition for Writ of Certiorari to the Circuit Court of Randolph County, Missouri

RELATOR'S STATEMENT, BRIEF AND ARGUMENT

JEREMIAH W. (JAY) NIXON
Attorney General

CASSANDRA K. DOLGIN
Assistant Attorney General
Missouri Bar No. 38821

Post Office Box 899
Jefferson City, Missouri 65102
(573) 751-3321

Attorneys for Relator

INDEX

	<u>Page</u>
TABLE OF AUTHORITIES	2
JURISDICTIONAL STATEMENT	4
STATEMENT OF FACTS	5
POINT RELIED ON.....	7
STANDARD OF REVIEW.....	8
ARGUMENT.....	9
CONCLUSION.....	12
CERTIFICATE OF SERVICE.....	13
CERTIFICATE OF COMPLIANCE.....	14

TABLE OF AUTHORITIES

Page

CASES

<u>Abel v. Wyrick</u> , 574 S.W.2d 411 (Mo. banc 1978).....	9
<u>In re Tinajero v. Schweitzer</u> , 658 S.W.2d 38 (Mo. App. 1983).....	9
<u>McIntosh v. Haynes</u> , 545 S.W.2d 647 (Mo. banc 1977).....	9, 10, 11
<u>State v. Stewart</u> , 14 S.W.3d 671 (Mo. App., E.D. 2000).....	9
<u>State ex rel. Hill v. Davis</u> , 488 S.W.2d 305 (Mo. App., K.C. Distr. 1972).....	8
<u>State ex rel. Miller v. O'Malley</u> , 342 Mo. 641, 117 S.W.2d 319 (Mo. 1938).....	8
<u>State ex rel. Reorganized School District R-9 of Grundy Co. v. Windes</u> , 513 S.W.2d 385, (Mo. 1974).....	8
<u>State ex rel. Stewart v. Blair</u> , 208 S.W.2d 268 (Mo. banc 1947).....	8, 10
<u>State ex rel. Tolliver v. Board of Public Service of the City of St. Louis</u> , 453 S.W.2d 622 (St. Louis Court of Appeals, 1970)	8
<u>Thompson v. Sanders</u> , 70 S.W.2d 1051 (Mo. 1934).....	10, 11

CONSTITUTIONAL & STATUTORY PROVISIONS, AND COURT RULES

Missouri Constitution, Article V, § 4(1).....	4
Section 217.378, RSMo. (2000).....	5
Missouri Supreme Court Rule 84.....	4

Missouri Supreme Court Rule 91.....	4, 9
-------------------------------------	------

JURISDICTIONAL STATEMENT

This is an original proceeding in certiorari pursuant to Missouri Supreme Court Rules 84.22 to 84.26, inclusive. On August 30, 2001, the Honorable Ralph Jaynes, Circuit Judge for Randolph County, Missouri, granted a writ of habeas corpus upon the petition of Eric B. Wise, filed in the Circuit Court of Randolph County on July 26, 2001. Respondent Jaynes vacated the amended judgment revoking probation in Wise's criminal case, cause number CR899-125FX, and remanded the case "for further proceedings of the Circuit Court of Nodaway County, Missouri . . . as may be consistent with this Judgment." Substitute Certified Record (hereinafter "R."), at 14.

This Court has jurisdiction under the Missouri Constitution, Article V, § 4(1) and Missouri Supreme Court Rules 84 and 91, to hear and decide the validity of respondent Jaynes' issuance of the writ of habeas corpus.

STATEMENT OF FACTS

Habeas petitioner, Eric B. Wise, is incarcerated at the Moberly Correctional Center in Moberly, Missouri, pursuant to the “First-Amended Judgment On Motion to Revoke Probation” entered in the Circuit Court of Nodaway County, Missouri, on December 20, 2000. R. 68. Wise pled guilty on January 27, 2000, to two counts of Possession of a Controlled Substance with Intent to Distribute and one count of Sale of a Controlled Substance. R. 64. The prosecutor thereupon dismissed counts 2, 3, 6, 7, 8, 9, 10, and 11 of the Information. R. 64. The trial court sentenced Wise on March 20, 2000, to three concurrent terms of fifteen years imprisonment, pursuant to § 217.378, RSMo., recommending Wise’s placement in the Missouri Regimented Discipline Program. R. 64. On November 13, 2000, Wise’s probation was revoked, and the concurrent terms of fifteen years imprisonment ordered executed. R. 68-69. An amended judgment to that effect was filed on December 20, 2000. R. 68. The trial court expressly found that Wise had been advised of his right to counsel and waived said right. R. 68.

Wise filed a petition for writ of habeas corpus on July 26, 2001, in the Circuit Court of Randolph County, Missouri, cause number CV-3-01-262-CC, claiming that (1) that he was denied the benefit of counsel; and (2) the trial court erred and abused its discretion in revoking petitioner’s probation upon a technical violation. R. 90.

On August 30, 2001, Respondent Jaynes issued a Judgment granting the writ of habeas corpus, having found that “[a]lthough the Amended First Amended Judgment on Motion to Revoke Probation recites that this Petitioner was informed of his right to counsel and that counsel would be appointed if he could not afford an attorney, and that Petitioner waived his right to counsel, the transcript provided to the Court of the revocation hearing shows otherwise.” R. 13. Contrary to the finding of the Circuit Court of

Nodaway County, Missouri, Respondent Jaynes expressly found that “Petitioner was not advised of his right to counsel at the revocation hearing of November 13, 2000, and that he did not waive such right to counsel.” R. 13. Before the habeas court, Wise did not dispute the findings of the trial court but challenged the validity of his waiver. R. 47-48. Neither party to the habeas proceeding included with its filed pleadings the transcript relied upon by Respondent Jaynes, and the transcript, though included in the certified copy of “original pleadings contained in the Court file in Case No. CV-3-01-262-CC,” R. 1, 17-43, was not filed and is therefore not part of the habeas record. Compare R. 17 (no “Filed” stamp indication), 2 (not included in docket entries), respectively. In any event, the transcript is silent on the issue. Compare R. 18.

Relator filed his petition for writ of certiorari in the Missouri Court of Appeals, Western District, on September 10, 2001. On that same date, the court of appeals summarily denied the petition. Exhibit 6 to Petition For Writ Of Certiorari.

POINT RELIED ON

I.

RELATOR IS ENTITLED TO AN ORDER QUASHING THE WRIT OF HABEAS CORPUS BECAUSE THE CIRCUIT COURT EXCEEDED ITS JURISDICTION IN GRANTING THE PETITION FOR WRIT OF HABEAS CORPUS, IN THAT THE HABEAS PETITIONER FAILED TO PROVE THAT HE WAS NOT ADVISED OF HIS RIGHT TO COUNSEL PRIOR TO PROCEEDING WITH THE PROBATION REVOCATION HEARING. TO THE CONTRARY, THE TRIAL COURT FOUND THAT PETITIONER WAS ADVISED OF HIS RIGHT TO COUNSEL AND WAIVED SAID RIGHT AND PETITIONER DID NOT DISPUTE THAT FINDING. THE FACT THAT THE TRANSCRIPT OF THE REVOCATION HEARING WAS SILENT ON THE ISSUE DID NOT NEGATE THE TRIAL COURT'S FINDING.

McIntosh v. Haynes, 545 S.W.2d 647 (Mo. banc 1977)

Thompson v. Sanders, 70 S.W.2d 1051 (Mo. 1934)

Missouri Supreme Court Rule 91

STANDARD OF REVIEW

Certiorari lies to correct judgments of lower courts that are without jurisdiction, or are in excess or abuse of their jurisdiction. State ex rel. Reorganized School District R-9 of Grundy Co. v. Windes, 513 S.W.2d 385, 390 (Mo. 1974). Certiorari does not determine the merits of the underlying controversy. State ex rel. Hill v. Davis, 488 S.W.2d 305, 308 (Mo. App., K.C. Distr. 1972) (citing State ex rel. Miller v. O'Malley, 342 Mo. 641, 117 S.W.2d 319 (Mo. 1938)). Rather, “the superior court determines the jurisdictional issue from the face of the return and either quashes it or upholds the tribunal’s action.” State ex rel. Tolliver v. Board of Public Service of the City of St. Louis, 453 S.W.2d 622, 623 (St. Louis Court of Appeals, 1970). When the facts alleged and proved in a proceeding for habeas corpus are insufficient to justify the relief granted, a superior court has the authority, pursuant to a writ of certiorari, to quash an inferior court’s writ of habeas corpus. State ex rel. Stewart v. Blair, 208 S.W.2d 268, 276 (Mo. banc 1947).

I.

RELATOR IS ENTITLED TO AN ORDER QUASHING THE WRIT OF HABEAS CORPUS BECAUSE THE CIRCUIT COURT EXCEEDED ITS JURISDICTION IN GRANTING THE PETITION FOR WRIT OF HABEAS CORPUS, IN THAT THE HABEAS PETITIONER FAILED TO PROVE THAT HE WAS NOT ADVISED OF HIS RIGHT TO COUNSEL PRIOR TO PROCEEDING WITH THE PROBATION REVOCATION HEARING. TO THE CONTRARY, THE TRIAL COURT FOUND THAT PETITIONER WAS ADVISED OF HIS RIGHT TO COUNSEL AND WAIVED SAID RIGHT AND PETITIONER DID NOT DISPUTE THAT FINDING. THE FACT THAT THE TRANSCRIPT OF THE REVOCATION HEARING WAS SILENT ON THE ISSUE DID NOT NEGATE THE TRIAL COURT'S FINDING.

Habeas corpus under Rule 91 is the proper mechanism by which a prisoner may challenge a probation revocation. State v. Stewart, 14 S.W.3d 671, 672 (Mo. App., E.D. 2000); see also Abel v. Wyrick, 574 S.W.2d 411, 416-421 (Mo. banc 1978). In a habeas corpus proceeding, the petitioner must establish his right to the relief sought -- i.e., petitioner carries the burden of proof. McIntosh v. Haynes, 545 S.W.2d 647, 654 (Mo. banc 1977). Petitioner's burden is a heavy one. In re Tinajero v. Schweitzer, 658 S.W.2d 38, 39 (Mo. App. 1983). "To entitle petitioner to discharge from such imprisonment on habeas corpus, it [is] incumbent upon him to plead and *prove* a state of facts that would avoid the effect of the commitment under which he is held." Thompson v. Sanders, 70 S.W.2d 1051, 1053 (Mo. 1934) (emphasis added). Allegations alone do not constitute substantial evidence on the matter. Accord,

McIntosh, 545 S.W.2d at 654; see also Stewart, 208 S.W.2d at 275 (in a habeas corpus proceeding, factual allegations in petitioner’s motion for new trial do not prove themselves). Rather, in order to meet his burden of proof, petitioner must establish through evidence the veracity of his allegations.

Habeas petitioner Wise did not present any evidence that he had in fact not been advised of his right to counsel. To the contrary, the record established that Wise had been advised of his right to counsel and waived that right. R. 68. Moreover, in his Traverse, Wise did not refute the trial court’s finding, but instead argued that his waiver was not knowing, intelligent, and voluntary due to his age and lack of experience. R. 47-48. On the face of the record, therefore, Wise was not entitled to habeas relief.

In granting habeas corpus relief, however, Respondent Jaynes relied upon “the transcript provided to the Court of the revocation hearing . . .” R. 13 -- a transcript that was neither filed by Wise or Relator and which is not properly part of the record before the habeas court. Compare R. 2.¹ Though not filed by a party to the underlying habeas proceeding, even if the revocation hearing transcript could properly be considered part of the record before the habeas court, said transcript did not “show[] otherwise” as found

¹Upon first learning of this transcript from the circuit court’s August 30, 2001 Judgment, the undersigned contacted Respondent Norma Prange to arrange to have a copy of said “transcript” provided to counsel. Respondent Prange advised the undersigned that the transcript had not been filed in cause number CV-3-01-262-CC though it was in the court file, and that she was not familiar with how it had come to be included in the file. Though the transcript was not filed with any of the party’s pleadings and was not separately filed, compare R. 2, 17, Respondent Prange has included the transcript in the certified “copy of original pleadings contained in the Court file in Case No. CV-3-01-262-CC.” R. 1.

by Respondent Jaynes. R. 13. Rather than addressing the advisement of the defendant's right to counsel and waiver thereof, the transcript is silent on the matter. Compare R. 18.² Respondent Jaynes acted in excess of his jurisdiction in granting the writ of habeas corpus upon a silent transcript and in complete disregard to the express finding by the Circuit Court of Nodaway County in its Judgment that Wise had been advised of his right to counsel and waived same. R. 68.

Accordingly, Respondent Jaynes' grant of the writ contravenes this Court's decisions in McIntosh and Thompson and requires quashing the writ.

²The likely for that silence, particularly in light of the fact that petitioner has never refuted that he was advised of his right to counsel and had waived that right, and consistent with the trial court's "First-Amended Judgment On Motion To Revoke Probation," is that the trial court simply did not go on the record until after the advisement and waiver had occurred.

CONCLUSION

WHEREFORE, for the reasons herein stated, relator respectfully submits that the petition for writ of certiorari should be granted and the writ of habeas corpus issued by respondents quashed.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

CASSANDRA K. DOLGIN
Assistant Attorney General
Missouri Bar # 38821

Post Office Box 899
Jefferson City, Missouri 65102
(573) 751-3321

Attorneys for Relator

CERTIFICATE OF SERVICE

I hereby certify that one true and correct copy of the foregoing and one diskette containing a true and correct copy of the foregoing was mailed, postage prepaid, on this ____ day of November, 2001, to:

Eric B. Wise
Reg. No. 1037590
Moberly Correctional Center
P.O. Box 7
Moberly, MO 65270

The Hon. Ralph Jaynes
Circuit Judge of Randolph County, Missouri
223 North Williams St.
Moberly, MO 65270
(660) 263-5105

Norma Prange, Circuit Clerk
Circuit Court of Randolph County, Missouri
223 North Williams St.
Moberly, MO 65270
(660) 263-4474

CASSANDRA K. DOLGIN

CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(c), the undersigned counsel hereby certifies that this brief complies with Rule 55.03 and the type-volume limitation, in that this brief was prepared with WordPerfect 9.0 (Times New Roman 13 point font) and contains 1957 words as identified by the word-processing software, excluding the cover page, signature block and certificates of service and of compliance. In addition, the undersigned counsel hereby certifies that the enclosed diskette has been scanned for viruses with Norton Anti-Virus software and found virus-free.

CASSANDRA K. DOLGIN